FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1604

(Consolidated with Nos. 76-1471, 76-1521, 76-1595, 76-1624, and 76-1685)

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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PEERS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

ARGUMENT

In its opening brief, the American Newspaper Publishers Association (ANPA), opposed on constitutional, statutory, and administrative law grounds the FCC's prospective rules, affirmed by the court of appeals, which prohibit the holder of a broadcast license from instituting publication of a daily newspaper in the same community and, similarly, deny a newspaper publisher the right to apply for a new local broadcast

license. ANPA supported the FCC's decision not to disrupt most existing service patterns—a policy judgment with which the court of appeals disagreed and which it reversed in favor of its own views.[1] Three respondents argue against part or all of ANPA's position.[2] Of these, only the National Citizens Committee for Broadcasting (NCCB) fully supports the judgment of the court of appeals. The Federal Communications Commission (FCC) supports the lower court's affirmance of its prospective rules but defends its divestiture policy. The United States (US) agrees with the court of appeals' analysis of the FCC's action but urges that the court erred in its attempt to promulgate a divestiture rule of its own rather than remanding the matter to the FCC. This reply brief will be limited to those points where ANPA believes a further response will be useful. However, failure by ANPA to address a point raised by respondents should not be construed as concession to it.

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[1] ANPA agrees with the result reached by the court of appeals in reversing FCC divestiture orders against certain small-market combinations, and supports the Brief of Joint Respondents (Gray Communications, Inc., The Brockway Company, Daily Telegraph Printing Company, WJAG, Incorporated, and Owosso Broadcasting Company, Inc.) urging affirmance of that aspect of the court's judgment.

[2] Additionally, ANPA has received two *amicus* briefs, accompanied by motions for leave to file, generally supporting these respondents. Since these documents appear to raise nothing new except for material not on the record of this case, ANPA will not specifically address them in its reply.

I. Respondents Have Failed To Show That the FCC's Prospective Rules Making Publication of a Local Newspaper an Absolute Disqualification for a Broadcast License in the Same Community Are Constitutional or Within the Agency's Statutory Authority

A fundamental, but not always stated, premise of the constitutional arguments by the FCC, US, and NCCB is that the FCC has broad authority to regulate what the US calls the "communications market." (US Br. at 15.) By this glib phrase, radio, television, wire communications, and newspapers are all swept into the same regulatory scheme. These arguments ignore the significant constitutional differences between publishing a newspaper, on the one hand, and engaging in electronic communications, on the other. For example, all three respondents rely heavily on *National Broadcasting Co. v. United States,* 319 U.S. 190, 227 (1943), which stands for the undisputed proposition that "[t]he right of free speech does not include, however, the right to use the facilities of radio without a license," and other broadcast cases such as *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969). (FCC Br. at 26-28, US Br. at 24, NCCB Br. at 21-22.) The difficulty with these cases is that they prove too little. As conceded by the FCC, these cases are grounded on the fact that there is a scarcity of electromagnetic spectrum available for broadcasting which means that "the First Amendment has a meaning for broadcasting that is different from its meaning for other media of expression." (FCC Br. at 27.) These technical limits have been held to justify governmental management of the use of the airwaves. No such technical limitations apply to publishing and, thus, none of the cases or policy relied on by respondents suggests that the FCC can constitutionally regulate the right to publish a newspaper.

Yet, by the device of denying access to a valuable governmental privilege—namely, a broadcast license—the FCC's prospective rules have the practical effect of restricting the right to publish a newspaper just as much as they restrict the granting of broadcast licenses.

A second common theme in respondents' briefs is the suggestion that because the prospective rules do not involve content regulation, they pass constitutional muster. (FCC Br. at 29, US Br. at 21, NCCB Br. at 22.) Squarely at odds with this overly narrow view of the First Amendment is *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which condemned a state tax on gross advertising receipts imposed on *all* newspapers with weekly circulations over 20,000. Content regulation is not the only form of government interference with a free press which is prohibited by the First Amendment. This Court has made it clear that *Grosjean* stands for the proposition that the First Amendment prohibits the "singling out of the press for treatment different from that accorded other business in general." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 194 (1946).

The US attempts another argument to justify the prospective rules under the First Amendment. (US Br. at 22-23.) This argument has as its major premise the *ipse dixit* that the antitrust laws would prohibit the acquisition of one of a community's two newspapers by the other, an assertion which fails to prove that the First Amendment would not be offended by such an application of the antitrust laws. The minor premise of the US argument is that its newspaper acquisition hypothetical is "identical in form, and in principle to the First Amendment argument made in this case." (US Br. at 22.) Actually, however, under the anti-

trust laws as interpreted by this Court when judging the legality of a merger involving large market shares, "only a further examination of the particular market —its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962), quoted with approval in *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974). In this case, ANPA's First Amendment argument objects precisely to action that could not be taken under the antitrust laws, namely, a broad-brush restriction on newspaper publishers in the absence of any particularized showing of anti-competitive effect in a given market. Thus, the ultimate conclusion of the US, that the prospective rules are valid under the First Amendment, rests on invalid premises.

The lumping together of broadcasting and newspapers into a fuzzy "communications market" also ignores the specific statutory language in the Communications Act of 1934 which gives the FCC authority only to regulate "communication by wire and radio." 47 U.S.C. § 151. Despite this language, respondents take comfort in their claim that "[t]he Commission's new rules treat newspaper owners and broadcast licensees alike" (US Br. at 24), and ignore the plain fact that the FCC does not have authority to regulate all mass media generally, either directly or, as here, indirectly through its power over affiliated broadcast media interests. This failure by respondents to acknowledge the distinction between the FCC's proper field of concern—broadcasting—and other, unregulated, media explains their otherwise untenable assertion that *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), rec-

ognizes that the FCC has statutory authority to make regulations based on the public interest in diversity in the mass media generally. However, *Storer*, and all other FCC rulemaking actions promoting diversity prior to the present case, involved only rules allocating ownership of the electronic media within the FCC's legitimate regulatory sphere. The FCC's present attempt to extend its jurisdiction to include newspaper publishing is, therefore, not supported by precedent, but arises solely out of the erroneous claim that authority over broadcasting equates to authority over all mass media.

ANPA's discussion of the post-enactment legislative history of the Communications Act demonstrated that almost from the beginning there has been a continuing dialogue between Congress and the FCC in which both bodies have presupposed that the FCC has neither constitutional nor statutory authority to hold newspaper publishers per se unqualified to obtain broadcast licenses. (ANPA Br. at 34-46.) The FCC and NCCB also refer to bills passed by the House and Senate in 1974 (but not enacted) directing the FCC to complete the proceeding here under review.[3] *See* H.R. REP. No. 93-961, 93d Cong., 2d Sess. (1974); S. REP. No. 93-1190, 93d Cong., 2d Sess. (1974). *See also* 1974 CONGRESSIONAL QUARTERLY ALMANAC 714-717. (FCC Br. at 25, NCCB Br. at 19-21.) However, these bills do not reflect a congressional view that the FCC has authority to adopt the rules in question here. They are en-

[3] The House bill also would have prohibited the FCC from restructuring the industry on an ad hoc basis in renewal proceedings prior to completion of Docket No. 18110. NCCB incorrectly states that both houses adopted this provision. (NCCB Br. at 19-20.)

tirely consistent with earlier congressional expressions that the FCC has no such authority and merely indicate concern that the FCC promptly complete its then pending inquiry which specifically included an investigation of whether or not the FCC had such authority. *Further Notice of Proposed Rulemaking*, 22 F.C.C.2d 339, 349 (1970) (A. 121). Even if these bills had been enacted, the FCC would have been free to conclude, as it should have done consistently with its own and Congress' prior understanding, that it would not adopt general rules barring newspaper/broadcast cross-ownership.

II. NCCB and the US Have Not Established That the FCC's Decision Not To Disrupt Existing Service by Broadcast Stations Affiliated with Local Newspapers Was Unlawful or Unreasonable

The reversal by the court of appeals of the FCC's considered decision not to disrupt forcibly most existing ownership patterns in the absence of specific abuses is supported, vigorously by NCCB and more tentatively by the US. Their policy preferences were adopted by the court after having been rejected by the agency properly charged with making policy. These respondents echo the court of appeals in contending that the FCC has all along had a policy in favor of divestiture and that the FCC gave too much weight to other important considerations vis-á-vis diversity.

As to the first of these contentions, that there is an already existing presumption in favor of divestiture from which the FCC departed, respondents, by a process of wishful thinking, simply translate the FCC's long-standing recognition that diversity is *one* of the public interest factors to be considered in licensing into a supposed policy that diversity is the *only* significant

public interest factor. (US Br. at 33-35; NCCB Br. at 27-29.) In attributing this policy presumption to the FCC rather than to the court of appeals and to themselves, respondents are obviously aware of the rule that "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Their rhetoric outruns reality, however, for the FCC has, as a matter of law and fact, repeatedly and for decades found "that the public interest, convenience, and necessity would be served by the granting" of licenses and renewals of licenses to present cross-owners. *See* 47 U.S.C. § 309(a). More generally, even the court of appeals elsewhere has recognized that "[d]iversification is a factor properly to be weighed and balanced with other important factors." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1214 n.36 (D.C. Cir. 1971).

Respondents and the court of appeals may now disagree with the FCC's policy judgments, but it is disingenuous for them to suggest that the FCC itself has adopted their policy. Moreover, to the extent respondents suggest that divestiture is a normal remedy used by the FCC, again actual FCC practice is to the contrary. Over the years, divestiture of multiple owners has been a very rarely used technique in rulemaking, and the FCC has repeatedly recognized that divestiture is disruptive. *E.g.*, REPORT ON CHAIN BROADCASTING 67 (1941); *Multiple Ownership of AM, FM and Television Broadcast Stations*, 18 F.C.C. 288, 292 (1953); *Distribution of Television Broadcasting Signals by CATV Systems*, 2 F.C.C.2d 725, 784-85 (1966); *Diversification of Control of CATV Systems*, 23 F.C.C.2d 833, 835 (1970).

The second tactic used by the court of appeals and repeated by the US and NCCB is an attempt to examine separately the various countervailing factors relied on by the FCC in support of its decision not to divest most existing combinations and show how each factor, such as local ownership and management, economic dislocation, continuity of service, and quality of programming, is not really, in respondents' view, very important. (US Br. at 36-51; NCCB Br. at 32-45.) Perhaps some of these factors individually are not as significant as others or do not apply in every situation, but the court of appeals and respondents fail to accord due recognition to the fact that the FCC's decision was based on the totality of these factors in an overall context of the need for making available to the public the best possible broadcasting service. The FCC found that *in sum* these factors outweighed any "mere hoped for gain in diversity." 50 F.C.C.2d at 1078 (A. 198). This weighing of factors by the agency should not be disturbed by the courts. *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).

CONCLUSION

For the reasons stated above and in ANPA's opening brief, the judgment of the court of appeals should be reversed, except to the extent that it vacated the portions of the FCC's order which would require divestiture of existing small-market combinations.

Respectfully submitted,

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